Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of Section 11 of the	)	
Cable Television Consumer Protection and	)	CS Docket No. 98-82
Competition Act of 1992	)	
	)	
Implementation of Cable Act Reform	)	CS Docket No. 96-85
Provisions of the Telecommunications	)	
Act of 1996	)	
	)	
The Commission's Cable Horizontal and	)	
Vertical Ownership Limits and	)	MM Docket No. 92-264
Attribution Rules	)	
	)	
Review of the Commission's	)	
Regulations Governing Attribution	)	MM Docket No. 94-150
Of Broadcast and Cable/MDS Interests	)	
	)	
Review of the Commission's	)	
Regulations and Policies	)	MM Docket No. 92-51
Affecting Investment in the	)	
Broadcast Industry	)	
	)	
Reexamination of the Commission's	)	MM Docket No. 87-154
Cross-Interest Policy	)	

To: The Commission

COMMENTS OF SHERJAN BROADCASTING CO., INC. (WJAN-CA)

1. These Comments are submitted on behalf of Sherjan Broadcasting Co., Inc. ("Sherjan"), licensee of Class A television station WJAN-CA, Miami Florida, in response to the Commission's *Further Notice of Proposed Rule Making* ("*FNPRM*") in the above-captioned proceeding, published at 66 Fed. Reg. 51905 (Oct. 11, 2001).

2. The focus of this proceeding appears to be on relationships between cable television systems and distributors of national programming. But there are local programmers as well who

must be taken into account. Local programming has been the bedrock of American broadcasting regulation from the start -- perhaps the highest valued public benefit offered by the broadcasting industry. However, cable operators, because of their absolute bottleneck control of entry into each and every television receiver to which their wires are attached,[1/] both have and exercise the power to make or break local programmers just as much, if not more, than they do national programmers.

3. To protect the ability of local program producers to establish a relationship with the viewing audience and to allow the public to have access to local programming, the Commission must consider limits on how much of a single Designated Market Area ("DMA") any one cable operator should be able to control. In other words, national limits alone are not enough. Regardless of whether or not the current national limits are raised, new limits must be imposed on local market control.

4. Sherjan's television station in Miami serves the Cuban population that makes up the majority of the Hispanic population in a market that overall is largely Hispanic. All of the other Spanish language television services are directed toward the national Hispanic demographic, based mostly on Mexican culture. Not only does WJAN-CA stand alone in serving the majority demographic of the Hispanic population but it also originates several hours of local programming each day -- more local programming by far than any of the full power television stations in the Miami market.

5. When there were a half-dozen different cable operators in the Miami market, Sherjan could try to persuade each of them of the merits of its programming; and if one picked up the signal,

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1/ The U.S. Court of Appeals for the 4th Circuit recently recognized this bottleneck in *Satellite Broadcasting and Communications Assn. v. FCC*, Cases No. 01-1151 *et al.*, Dec. 7, 2001, slip op. at p. 40: " Congress had substantial evidence that cable operators had bottleneck monopoly power over their subscribers' access to television signals and that cable operators had substantial economic incentives to abuse that power by denying carriage to local broadcast stations even when those stations were more popular with cable subscribers than some of the cable channels that replaced them."

viewers would talk to their neighbors, and other cable operators would then hear the demand from their subscribers. However, even in those days, Sherjan could achieve cable carriage only through statutorily-compelled leased access under Section 612 of the Communications Act, for which it paid dearly.

6. In the past few years, AT&T Broadband has purchased almost all the cable systems in the market. It now has a virtual monopoly over cable subscribers throughout the DMA. It raised Sherjan's leased access fees to over $1 million a year -- a financial burden borne by no other broadcaster in the market, regardless of its signal reach or the popularity of its programming. WJAN-CA is being slowly strangled. The most prolific source of Hispanic local programming in the market is threatened. The story of WJAN-CA's struggle is told eloquently by Omar Romay, Vice President and General Manager of the station. To put his words into legal language would only dilute and spoil the story. Thus Mr. Romay's comments are presented as an attachment, written in his own words.[2/]

7. Sherjan further calls the Commission's attention to its recent comments in CS Docket No. 01-129, which are also attached hereto for inclusion in the record in this proceeding. Those comments detail the expenditures Sherjan has faced and the difficulty it has had negotiating with AT&T Broadband.

8. If there is a message here, it is that the cable industry is narrowly focused on cash flow and profit -- perhaps not much differently from other business enterprises. The concept of local public service that has been the foundation of the broadcast industry from the start simply is not a part of the cable picture, but it must be part of the Commission's picture. Cable operators will always favor programming in which they have an ownership interest and programming that generates an immediate cash flow through both fees paid by program suppliers and profits from

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2/ The numbers before each paragraph in the Attachment hereto refer to paragraph numbers in the *FNPRM*, which is why they are not sequential.

vertical ownership. No matter how attractive Sherjan's programming may be, AT&T Broadband will not carry it without a fee that greatly exceeds what any other channel of comparable public popularity pays. AT&T knows that WJAN-CA cannot survive without cable and will pay to survive, assuming that Sherjan is not pushed over the brink and goes broke, resulting in a complete loss to the public of WJAN-CA's local service.

9. Only by ensuring that more than two cable operators serve each DMA, without giving more than 40% control to any one of them, can the Commission avoid further reduction of competition and loss of all local production and broadcasting in the market. It is not necessary to insist on overbuilds, with two operators offering service in the same block. But the public interest and the development of the local programming marketplace do require more than two cable operators in a DMA. National ownership limits may help national programmers, but they do not help the local component that is such an important part of the function of our free society.

Respectfully submitted,

/s/ Peter Tannenwald
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January 4, 2002

STATEMENT OF OMAR ROMAY

The following are comments and empirical evidence that show that at least one cable company, AT&T Broadband, after reaching control of almost all of Dade county's cable market place, Miami, Florida; acted unreasonably, and showed anti-competitive behavior that threatened to unfairly impede the flow of video programming from the video programmer to the consumer in a way that is clearly against public interest.

WJAN-CA, a local class A television station licensed by the FCC to serve the Miami market, has offered Miami cable companies to carry its programming, on the understanding that no true local broadcast station, committed to serve the Miami community would be viable without cable carriage in a market with a cable penetration of more than 70%.

Leased access was the only alternative given to WJAN-CA, although the station offered to broadcast 24 hours of Spanish language programming, and at least three hours a day of locally produced Spanish language programming, in a market where only two Spanish broadcast networks existed. Moreover, those two networks mostly serve the national Spanish audience, originally from Mexico, quite different culturally to the predominant Cuban originated 57% of Miami, Dade's total population. No one offers more local programming, produced in Miami, in Spanish or English, at this time in our market than WJAN-CA.

We understood that we did not have a record of public acceptance in the market, so we started paying for cable carriage until we could show a significative recognition of our programming in our community. We thought, of course, that we had to make an additional investment to prove the value of our offer to the cable companies. We believed that they would later reduce or eliminate the fee we were paying.

After paying cable companies for carriage for more than 5 years, and achieving higher ratings on prime time than any cable network, we did not get a reduction of the fees we paid. In fact, once AT&T Broadband bought TCI, Comcast, and Mediaone, we had to face an increase of the rate AT&T was charging.

Therefore, we believe that the 30% horizontal limitation and the 40% vertical limitation are reasonable; and even if the FCC decides to raise these percentages of control, which we do not advocate, these limitations should be imposed in a market-by-market basis. This is to avoid or ensure that no cable operator is capable to unreasonably impede the flow of programming, which is not only against the Congress' intent, but also against cable subscribers' desires. Furthermore this is a threat to the preferences of on-air audiences, that do not want to pay for cable or cannot afford it. All of this is contrary to public interest and should be protected.

From here on I will try to contribute some theoretical as well as empirical evidence about the questions formulated on the FCC Further Notice of Proposed Rule Making. I would also like to thank the FCC for all the information, thoughtful discussion, and the opportunity given to us to try to answer some of these often-difficult questions.

III.A.8. We believe that our industry has always been divided in three interrelated markets: Production, distribution and exhibition. Cable, as well as the airwaves and satellite, are delivery means through which networks as well as broadcast stations exhibit their programming. Although cable may be seen as an exhibitor, we feel it adds more confusion than the traditional definition.

10. We believe that must carry rules helped limit the barriers a cable system can place between full power broadcast stations and consumers. However, it did not help to protect and encourage the creation of local programming through local broadcast stations. Since the beginning of cable, most local stations have been sold to national networks. Very few local stations still produce and exhibit local programming in our country. So we ask ourselves whether local programming is still perceived by the government as something worthy of protection and encouragement. We believe that it is paramount for our communities, and it should be promoted. Furthermore, we feel it is unfair that cable networks can raise income from advertising and cable system fees, while broadcast stations can only receive advertising income or face the threat of cable companies rejecting carriage if they choose retransmission consent instead of must carry. It shows

that nowadays paid television is preferred to free television, although people still watch more broadcast than cable programming on cable all around this country.

15. There is no doubt that the negotiating disadvantages faced by programming developers, and especially at a local level, as in the case of WJAN-CA, are most of the time barriers that discourage the investment and distribution of new and diverse programming.

17. We agree that incumbency is the name of the game. If you are not able to get cable appreciation for what you do, innovation, although essential, is not enough to create a viable business nowadays.

22. DBS has not improved the situation of distribution access at a local level. WJAN-CA's situation clearly shows that quality or viewer interest is not a priority for cable systems in the Miami market.

24. We believe that the empirical evidence provided above shows that effective competition has not been reached yet. Effective competition would be established when any program supplier would be able to reach a viable size audience in any potential market, receive fair compensation, or pay a fair price according to the ratings they are able to generate compared to other program suppliers in the same system.

25. The fact that there an increasing number of channels are offered by cable does not necessarily show that more and effective competition has been achieved. It may also mean that one company is trying to reach more audience through a multiple number of narrowcasting stations.

28. WJAN-CA's situation is an evidence that such action that Congress sought to prevent is happening right now.

29. WJAN's cable carriage situation constitutes empirical evidence that anti-competitive behavior arises when cable system operators are not constrained by subscribership limitations.

31. After AT&T bought TCI, Comcast, and Mediaone in the Miami market, we did not see any innovation but rather saw an effort to discourage any local Spanish language programmer from

producing more local and quality programming by raising their leased access rates in a market where 57% of the total population is Hispanic according to 2000 Census.

33. The ability of the Local Franchising Authority to evaluate and reject renewal in terms of community needs and interests is virtually non-existent. We believe that the more cable companies that exist in a given market, the more people can compare services and complain to cable companies and Local Franchising Authorities.

35. WJAN-CA's situation shows that cable systems carry less diverse content than consumers desire.

40. We totally agree on this conclusion. We believe that limitations should stay and be established market by market too.

42. This conclusion is not necessarily true at the local level. DBS does not yet carry for free local stations, and it has no obligation to carry Class A stations despite their local programming.

43. At a local level, we have seen how networks signed exclusive contracts with program suppliers that not only increased the cost of programming but also did not allow program suppliers to sell content to competitors, even if they chose not to buy or broadcast the program the network competitor wanted to buy. We do not know of any practice like this at a cable level, but we would not be surprised if this happens.

44. As we explained before, it is almost impossible for a local broadcast station without must carry rights to survive and progress in a market where cable companies are allowed to have control, without any limitation. Cable companies do not invest in local programming but they sell advertising at a local level in a number of cable networks. Therefore, they perceive local broadcasters as competitors for the local advertising money. This is one of the many reasons they try to make access unattainable. In the Miami market, a local station needs to reach at least 70% of its potential households to be able to compete with national networks and to produce a minimum of 3 hours a day of successfully local programming and make a reasonable profit without paying cable

for carriage. So we believe 30% and 40% limitations market-by-market are reasonable if government wants true local broadcast stations to survive and to keep serving local communities.

56. We agree that limitations are totally justified when a cable company unilaterally determines the failure or success of a true local broadcast station.

84. Leased access rules have failed to provide a way for local programming to survive and develop. The fact that cable companies are allowed to charge a maximum rate which is not a reasonable rate for every situation, and the empirical evidence that no system in the country carries any amount close to the maximum leased access channels that should be available according to the statute, proves that public interest objectives are not being met.

I that the FCC finds these comments helpful.

/s/ Omar Romay
Omar Romay

January 4, 2002

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the matter of	)	
	)	
Annual Assessment of the Status of	)	**CS Docket No. 01-129**
Competition in the Market for the Delivery	)	
of Video Programming	)	

COMMENTS OF SHERJAN BROADCASTING CO., INC. (WJAN-CA)

1. Sherjan Broadcasting Co., Inc. ("Sherjan"), licensee of Class A television station WJAN-CA, Miami, Florida ("WJAN") hereby submits these comments in response to the *Notice of Inquiry* in this proceeding, wherein the Commission seeks information the state of competition in the market for delivery of video programming. These comments are focused on the monopoly power held by, and the exercise of that power, by the cable television industry.

2. Sherjan urges the Commission to look at competition and monopoly on a micro-basis as well as a macro-basis. Thus even if the cable television industry as a whole faces competition from over-the-air broadcasting, direct broadcast satellite systems, and other multichannel video service providers, it has an absolute monopoly on each individual television receiver to which its wires are attached. It absolutely controls access to each and every one of those receivers, and it exercises that monopoly power fully. Thus the only real competition in the marketplace is to wean the subscriber away from the cable company altogether; there is no possibility of competition by those who seek to provide programming to cable television viewers unless they can persuade a reluctant cable gatekeeper to open the gate. The Commission has recognized the bottleneck problem in the areas of local exchange telephone service and pole attachments. It is unrealistic to ignore the same strangulation that exists with cable television.

3. WJAN was the first station in the nation to receive a Class A television license. For almost four years, the station has provided increasing amounts of local programming to the Miami

Hispanic community. Its schedule currently includes four hours of local live programming in prime time every weekday evening, 240 minutes a week of live local news, and four hours of live public affairs and entertainment programming on weekends, which far exceeds the local programming service offered in prime time by any other Miami full power television station and exceeds total local programming for most full power stations in the market. WJAN has enjoyed audience shares, measured by Nielsen, of up to a 7 share, even though its interference-free signal falls far short of covering the full DMA.

4. Because Miami is within the Top 160 Metropolitan Statistical Areas, WJAN does not have cable must-carry rights, even though it competes head-on with full power Spanish language stations that do have must-carry rights. *See* Section 614(h)(2)(E) of the Communications Act. WJAN-CA does lease cable channels, but the competitive situation is extremely unbalanced, because WJAN-CA, which provides more local programming than <u>any</u> of its full power competitors, suffers enormous cable-related economic and marketing burdens that its competitors do not face. The sum and substance of it is that Sherjan has very direct experience with the impact of the cable monopoly on a receiver-by-receiver basis.

5. Sherjan pays dearly for cable carriage, while its competitors are carried for free. And for all that Sherjan pays, WJAN is carried on only the expanded tier in Miami proper, is carried only part-time on that tier, and reaches only about half of the subscribers of the largest cable operator in the DMA. It reaches only those cable subscribers who pay an extra fee for the expanded tier, and it does even reach those subscribers during home hours. The cost of even this limited carriage is strangling Sherjan and taking up funds that would, in substantial part, otherwise be invested in improving WJAN's service.

6. When Sherjan first sought cable carriage, there were a half dozen cable operators scattered throughout the Miami market. Sherjan negotiated with each of them, one-by-one, and eventually reached agreements to lease channels on most of the systems, albeit it at a cost of almost

$1 million a year for all the systems taken together. During the past few years, AT&T Broadband has purchased most of the systems in the market. AT&T Broadband has raised Sherjan's rate from just over $62,000 per month to $85,000 per month, or $1,020,000 per year, for AT&T Broadband's systems alone, which do not cover the entire market, not all of which carry WJAN-CA, and which carry WJAN-CA only part-time and not on the basic tier in Miami proper. Adding payments to other cable operators brings Sherjan's cable carriage bill to $1.4 million a year. Those payments make WJAN unprofitable notwithstanding the station's significant success in achieving audience shares of as much as a 7 share measured by Nielsen.

7. Sherjan has been negotiating with AT&T Broadband for approximately four months to try to reach a more reasonable carriage arrangement. However, AT&T Broadband is firm on its increased price and has refused to yield on two critical points: (a) It will not guarantee WJAN's channel placement, reserving the right to change the channel for any number of reasons outside of Sherjan's control; and (b) it will not list WJAN on its channel line-up. Thus while WJAN broadcast competitors are listed by their call letters, WJAN's channel is marked as simply "leased access" or "unavailable." In other words, WJAN cannot buy cable parity with its competitors at any price and must pay an economically strangling price for a channel that is not on the basic tier, is not full-time, and is not identified as WJAN in channel listings.

8. There can be no doubt that AT&T's market power is overwhelming as far as Sherjan is concerned. It is no different from the fact that a competitor for local telephone service must have access to the incumbent local telephone company's "local loop" wiring to the home in order to provide competitive service,[3/] or that a utility's poles are "bottleneck facilities" for any

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3/ *See In the Matter of Reform of Access Charges Imposed by Competitive Local Exchange Carriers*, Seventh Report and Order and Further Notice of Proposed Rulemaking in CC Docket No. 96-262 (released April 27, 2001).

telecommunications carrier or cable company seeking to run wires along the streets.[4/] Any television receiver to which cable is connected cannot receive WJAN at all unless it is on that cable. The monopoly over that particular television set is thus absolute.

9. In other words, while cable companies must compete against other multichannel video service providers to win subscribers in the first instance, they control an absolute monopoly gateway into each and every television receiver to which their wires are connected, and they are not required to offer access to that gateway except to the limited extent that the Communications Act forces a wedge for must-carry stations, public/educational/channels, and leased access.[5/] 10. The only way that a viewer can escape the gatekeeper's control is to take three steps: (a) disconnect the cable from the receiver, (b) attach an antenna to the receiver, and (c) reprogram the receiver's tuner to tune to broadcast rather than cable channels. The technical sophistication to do all that, and then to undo all three steps to resume cable viewing, is well beyond all but a very few diehard viewers. Thus, there can be virtually no competition among those who offer programming unless the cable operator opens the gate to the arena. As the keeper of the arena gate, the cable company enjoys significant monopoly power that the market place has not eroded, and essentially cannot erode.

11. As the largest cable provider in the Miami market, AT&T Broadband's monopoly power to control which broadcast stations viewers may watch is very substantial. The consolidation process that is sweeping through all media today, including AT&T Broadband's acquisition of most of the cable systems in the Miami DMA, is accelerating the problem. As discussed above, the burden on WJAN is direct and severe.

4/ *See Alabama Cable Telecommunications Assoc. v. Alabama Power Company*, FCC 01-181, released May 25, 2001, at par. 54.

5/ While Sherjan does lease cable channels, there is very little leased access going on in the this country today because of the price barrier that the Commission's Rules permit cable operators to erect. Sherjan plans to petition the Commission to re-examine its leased access rate regulations.

12. Sherjan urges the Commission to recognize the cable television receiver gateway monopoly in its Report and Order and in reports to Congress resulting from this proceeding. The Commission has recognized the bottleneck access problem in other contexts. Ignoring it in the cable context is both unrealistic and unjustified.

13. The Commission must take a closer look at the different facets of cable company power than it has in the past. Looking at multichannel video provider competition is only half the picture. The impact on program providers of the cable monopoly over end user terminations is the other half. In Miami, AT&T Broadband's exercise of receiver monopoly power has impaired WJAN's ability to help achieve the goal of Congress to encourage increased local programming services embodied in the Community Broadcasters Protection Act of 1999.[6/]

14. The first step is to recognize and discuss the problem. This proceeding is the place for that, and now is the time. Once there is recognition, the opportunity will arise to address the problem of remedies.

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6/ Codified at Section 336(f) of the Communications Act.